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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 923

HENRY V. McGURREN,
Petitioner-Defendant,
vs.

GLADYS McVEIGH, in her own proper person and as Guardian of the Persons and Estates of Thomas McConnell and Charles Dewey McConnell, Minors,
Respondent-Plaintiff.

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.

The United States Circuit Court of Appeals for the Seventh Circuit, in its opinion decided an important question (principle) of law in a manner which conflicts with decisions of other United States Circuit Courts of Appeal and which conflicts with decisions of courts of the State of Illinois in reference to res adjudicata.

Under point "I" commencing on page 6 of respondent's brief in opposition to the petition for writ of certiorari,

she attempts to negative petitioner's above contention. On page 8 of her brief, it is admitted that the evidence in the Superior Court case was substantially the same as the evidence in this case with reference to the alleged fraudulent, deceitful representations, and thereby respondent admits that in another proceeding brought by her in a court of her choosing, the success of which depended upon her proving the self-same fraudulent, deceitful representations alleged in this proceeding to have been made by this petitioner, she was denied the relief prayed for because the court found that this petitioner had not been guilty of said fraudulent, deceitful representations and that the release in question was not obtained from respondent by reason of any such alleged deceitful representations.

As indicated, this was an adjudication against respondent in a tribunal selected by her in a proceeding in which she attempted to rescind the release in question predicated on the theory that it was obtained by said fraudulent representations. Respondent makes no contention that there was any evidence of any kind or character that she presented at the trial of this case which she was unable to or did not present in the Superior Court case or that the evidence presented in this case was any different from that presented in said Superior Court case.

Petitioner has shown to the court that as a matter of law one who was not a party to a prior suit may properly take advantage of a finding in said prior suit against his adversary in a subsequent suit wherein such party is his adversary, and this although there may have been no privity between the defendant in the second suit and the parties to the first suit.

Respondent refuses to recognize the principles set forth in the various cases cited by petitioner, in that she maintains that in no case can a party take advantage of a find-

ing of fact in a prior adjudication unless there was some form of privity or mutuality between the parties. It is interesting to note that not in a single case cited by respondent did the court hold that the doctrine contended for by the petitioner would not apply to a case such as the one before this Court; for in every one of the cases cited there is either a total disregard of the principle of public policy based on the maxim of "*interest republicae ut sit finis litium,*" or the opinions are based upon cases against a tort feasor who might be guilty of the tortious acts attributed to him irrespective of the fact that some other person or persons may have been accused of being a tort feasor or a joint tort feasor in a prior proceeding and have been found not guilty.

Respondent admits that the courts of Illinois and other courts universally recognize that when an agent is sued for damages resulting from tortious acts attributed to him and has been found not guilty, his principal may plead such adjudication in a subsequent suit against the principal by the same plaintiff for the recovery of damages predicated on the doctrine of *respondeat superior.* If such is the case, then why is not the reverse good law: that is, when a principal has been sued and when in order to establish the cause of action it is necessary to show that his agent has been guilty of certain tortious acts and the plaintiff fails to recover against the principal because he cannot establish that the agent has been guilty of the tortious acts attributed to him, why should not the agent be entitled to plead that in the prior suit against his principal the said agent had been found not guilty of the tortious acts attributed to him, although he was not in any way a party to the prior proceeding or in privity in any way with the plaintiff? That the courts recognize the soundness of the reverse principle is established by the cases cited by petitioner.

We have pointed out that there is nothing to show that McConnell was a joint tort feasor with petitioner; but, even if it could be shown that he were, we have further pointed out that McConnell could not have been the active tort feasor as he was not present at the time of the commission of the active torts complained of in both proceedings and had nothing to do with the same and so petitioner has brought himself squarely within the principles of law enunciated in the cases of *Portland Gold Mining Co.* v. *Stratton's Independent Ltd., et al.,* 158 Fed. Rep. 63; *Anderson* v. *West Chicago St. R. R. Co.,* 200 Ill. 329; and *Emery* v. *Fowler,* 39 Me. 326, and other cases cited by him.

On page 8 of her brief, respondent has cited the case of *Keokuk R. R. Co.* v. *Missouri,* 152 U. S. 301, and *Crescent City Co.* v. *Butcher's Union,* 120 U. S. 141, 155. These cases are distinguished in the Petition for Rehearing, which is in the record before this Court (Tr. 460) to which this Court is respectfully referred where we also commented on *Bigelow* v. *Old Dominion Copper,* 225 U. S. 111, 128, which is an appeal from a Massachusetts decision. We wish, however to further comment on the latter case. We note that the latter portion of that case says, page 128:

> "It is too evident to need argument that the remedy of this plaintiff does not depend upon the culpable conduct of Lewisohn, but upon Bigelow's own wrong, whether alone or in cooperation with Lewisohn. The liability of each was several as well as joint, and a failure to recover against one is no bar to a suit against the other on the same facts."

This primarily is the gist of the above cited case, and it has no application to the case before the court. In other words, in the cited case, both Lewisohn and Bigelow were charged with being guilty of certain fraudulent acts. One

might have committed the act and the other might not have; one might be guilty for some reason of the act and the other might not be. But in the case before the Court, McConnell could not be guilty of the acts unless this defendant was. As we have pointed out a number of times, plaintiff has never shown that McConnell was a joint tort feasor with this defendant, but it has been established that defendant was the agent of McConnell. Again, the cited case says something about there not being any privity between the estate of Lewisohn and Bigelow, or between Lewisohn's executors and Bigelow. That case was decided upon the Massachusetts law, if that is the Massachusetts law, and it is not binding on this court. However, we submit that the law in that case should not be followed in this case for the reason that under the facts in the cited case, Lewisohn, who was sued in the New York court, could have been found not guilty of the acts attributed to him and yet Bigelow could have been guilty; while, in the case before the court, had suit been brought against McConnell in his lifetime predicated on the same theory as plaintiff started her suit in the Superior Court, it would have been brought on the theory that this defendant had perpetrated the deceitful acts, not that McConnell had perpetrated them or that he was a joint tort feasor, and a decision in favor of McConnell could have been pleaded by this defendant. Plaintiff now contends that because the action in the Superior Court upon which she prayed for relief predicated on the alleged deceitful and fraudulent acts of this defendant, was against the estate of McConnell, the decision against her in said case cannot be pleaded by this defendant. This is very strange legal logic; and if that is what the Massachusetts court said, then we respectfully submit that it is not good law. As far as the Supreme Court of the United States is concerned, that being the Massachusetts law, the

Supreme Court was bound to follow it. However, there was another very interesting proposition and one which carried a good deal of weight with the Massachusetts court in making the seemingly fine distinction that it did. An examination of the Massachusetts case, *Old Dominion Copper Co.* v. *Bigelow,* 203 Mass. 159, and the Supreme Court case, *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, shows that the New York judgment in favor of Lewisohn which was pleaded by Bigelow in the Massachusetts case, was not a judgment on the merits or a finding of fact at all. It was a judgment dismissing the proceeding in the New York Court predicated on a demurrer. That is, there was no finding of fact in the New York case that Lewisohn had not been guilty of the tortious acts attributed to him. Therefore, we have two very definite distinctions between the two cases and the instant case: first, that Bigelow might be guilty even though Lewisohn was not guilty; and second, that the judgment which was pleaded by Bigelow as estoppel or *res judicata* in the Massachusetts case was not a judgment or finding that Lewisohn had not been guilty of committing the tortious acts which it was necessary for him to commit in order to hold Bigelow liable and the case was not decided on the merits. There was no hearing and neither a court nor a jury determined or made a finding as to whether or not Lewisohn had in fact committed the tortious acts attributed to him.

Respondent, on page 10 of her brief, cites from Volume 24, American and English Encyclopedia of Law, 2nd Edition, page 747; but we find on reading further in the text that the authority recognizes the principles contended for by petitioner, for we find the following at page 752 of the same volume, edition, and subject matter:

> "Thus a judgment under the merits for the defendant in an action against the principal or master for

> the wrongful act or the negligence of his agent or servant is conclusive against the plaintiff in a subsequent action by him against the agent or servant."

Further, under (3), the same authority says:

> "Rationale of Rule—The application of the principle of *res judicata* to persons standing in the relation of principal and agent or master and servant has, by some authorities, been supported on the ground that privity exists between persons standing in these relations. But other authorities deny the existence of such privity, and hold that in such cases the technical rule is, upon grounds of public policy, expanded so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies."

Wherefrom it appears that the petitioner should have been allowed to plead the findings of fact set forth in the Superior Court decree to the effect that the petitioner had not been guilty of the fraudulent deceitful representations attributed to him, being the same deceitful fraudulent representations attributed to him in this proceeding, and thereby establish an issue which would enable him to produce evidence to that effect, so that he might have the benefit of the finding of fact in respect thereto made against the respondent in said Superior Court proceeding; and as pointed out on page 27 of the original brief, the ruling of the Circuit Court of Appeals to the effect that the petitioner could not plead and introduce evidence of such decree in the Superior Court was in that respect in conflict with the decision of another United States Circuit Court of Appeals and was in conflict with the decisions of the State of Illinois.

II.

The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decision of another Circuit Court of Appeals on the same matter in that the finding of the reviewing court, that the validity of the Release is immaterial, is tantamount to a determination by the reviewing court that the instruction in reference to the measure of damages given to the jury, although without objections or exceptions thereto, but in fact with the consent of Plaintiff thereto, was not the law of the case for the purposes of said appeal.

Respondent answers petitioner's contention above, under "II" of her brief, commencing on page 18, captioned as follows:

> "The Decision of the Court of Appeals with Respect to the Question of the Validity or Invalidity of the Release Is in Conformity with Applicable Local Illinois Decisions and Was Not in Conflict With Any Decision of Any Other Circuit Court of Appeals."

Respondent states that "the weakness of Defendant's argument is illustrated in an examination of his oft repeated assertion in his argument that 'it was imperative that Plaintiff establish that the release was valid' "; and on page 24 says, "How then should he be heard to argue that such injury and damage as have occurred should not have occurred because the release was invalid." Respondent goes into a lengthy discussion to the effect that the gist of the action was one of fraud and deceit. This has never been denied by petitioner. Neither has it been contended at any time by petitioner, assuming the respondent established the fraud and deceit alleged, that the instruction with respect to general damages (Instr. 20, Tr. 374) was not correct.

On page 20 of her brief, respondent apparently attempts to confuse the issue by suggesting that petitioner is now objecting to the instruction of the court given to the jury in respect to general damages. At no time did the petitioner object to such instruction. On the contrary, petitioner at all times has called attention to the fact that that instruction was binding, not only upon the respondent but also upon this petitioner and the reviewing court.

Respondent on page 22 of her brief refers to the instruction in reference to general damages set forth in petitioner's brief, page 41, and there again admits that it was a proper instruction. The position of petitioner is that by reason of that instruction the only damages that could be considered by the jury were the difference between what she received under the release in question and the value of the right or claim surrendered, canceled, or released under the terms of the release at the time and place of the execution of the release. This instruction, as indicated, became the law of the case and no other measure of damages could possibly be considered and all other measures of damages were excluded from the jury: that is the jury could not take into consideration anything that happened in the Probate Court in arriving at what damage, if any, was suffered by respondent by reason of the execution of said release. The instruction excluded from the consideration of the jury all other elements of damage. Respondent did not see fit to ask that the court instruct the jury that as a further or other element of damage the jury might consider what, if anything, plaintiff had been barred from recovering in the Probate Court by reason of the execution of said release; and clearly the reason no such instruction was asked for was, as has been pointed out, due to the fact that neither the respondent nor the court felt that what transpired in the Probate Court was in fact an element of damage to be considered by the jury. As has

been stated, the petitioner is not complaining of the instruction and believes that the instruction did set forth the proper measure of damages, and therefore says that when the Court of Appeals found that the validity of the release was immaterial that such finding was tantamount to holding that said instruction did not constitute the law of the case for the purpose of review.

Under the instruction, the question of the validity or the invalidity of the release became one of paramount importance for the reason that if the release was invalid so that it did not release the rights of plaintiff-sole and/or of plaintiff-guardian under the Property Settlement Agreement incorporated in the decree of divorce, then the respondent suffered no damage.

Petitioner in his original brief filed in the Circuit Court of Appeals, carefully pointed out the necessity, under the instruction given, that the release be valid in order to have caused damage, and in Point II of his petition for rehearing (Tr. 450) he renewed his contention that under the instruction in question the reviewing court was bound to hold that that instruction was the law of the case and could not therefore find that the validity of the release was immaterial when considered in connection with the measure of damages. We respectfully request this Court to examine said portion of said petition for rehearing.

It must at all times be borne in mind that this is not a discussion of the effect of the validity or invalidity of the Release in relation to the question of liability, but is a discussion of the effect of the validity or efficacy of the Release to cause damages to Plaintiff-sole or Plaintiff-guardian's wards, both or either of them as the case may be, because it constituted a legal and binding release of their rights, or the rights of either of them as the case

may be, under the Property Settlement Agreement, and if it was not legal or binding as to them or either of them, that is, plaintiff-sole or plaintiff-guardian, then as to said party or parties, as it was not legally binding, it could not and did not release any claim or right or surrender or cancel any claim or right of them or either of them as the case may be in the Property Settlement Agreement incorporated in the decree of divorce; and if no claim was cancelled, surrendered or released by them or either of them by reason of the release, then plaintiff-sole or the wards of plaintiff-guardian could suffer no damages, as they or either of them could only recover damages, under the following formula, that is, the difference between the fair and reasonable value at the time and place in question of the claim or right surrendered, cancelled or released by plaintiff under the terms of the release and the amount paid thereunder. The trial court clearly considered that the validity or invalidity of the release was of paramount importance in respect to the determination as to whether damage had been suffered by plaintiff-sole or by the wards of plaintiff-guardian, for he instructed the jury, over the objection of the plaintiff, as follows (Tr. 369):

> "As a matter of law, a guardian has no right to surrender, release, or cancel the claim of this ward or any of its wards against another person, for any sum of money whatsoever, without first the consent thereto of the court of jurisdiction over such guardian and such minors, and any release executed by such guardian of said minors without such consent is wholly void and invalid as a matter of law."

This was clearly a proper instruction to give, even over the objection of counsel for plaintiff, when plaintiff had specifically herself indicated that the basis for determining whether plaintiff-sole or plaintiff-guardian had suffered any damages was as set forth in Instruction 20 (Tr. 374) heretofore discussed and pointed out in our original brief and in this brief.

III.

The United States Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions in respect to the establishment of claims in the Probate Court in the State of Illinois.

Under "III" of respondent's brief, commencing on page 24 thereof, respondent says that the petitioner does not point out the important question presented.

It must be borne in mind that while the respondent throughout the trial of the case admitted that the matters and things that happened in the Probate Court were in fact immaterial as an element of damages (Rec. 184) referred to and quoted on pages 49 and 50 of petitioner's original brief herein, yet in the reviewing court she clearly switched her position and maintained that damage was proved by the denial of the claim in the Probate Court with which position the court of review erroneously concurred as appears from its opinion (Tr. 439). Petitioner then called attention to the fact that his pleadings as to what transpired in the Probate Court had been stricken as immaterial and that was the attitude of respondent and the court throughout the trial of the case as set forth at page 57 of petitioner's original brief herein on this point and therefore there was no attempt by petitioner to introduce any evidence as to what did transpire in the Probate Court in connection with the disallowance of respondent's claim therein, and the only evidence as to what transpired in the Probate Court was that introduced by respondent referred to in petitioner's original argument (pp. 57, 58) of this point which shows that such evidence was objected to.

Petitioner has pointed out in his original brief (page 54) that the statutes of the State of Illinois require that when a claim is objected to by the administratrix of the estate full proof thereof must be made by the claimant; and petitioner also pleaded in his answer, as shown in his prior brief, that the claim of respondent was not disallowed solely by reason of the release, and set forth in full the objections raised by the administratrix of the estate, thereby laying the foundation for establishing that the release was not the sole reason for the disallowance of said claim in the Probate Court.

The reviewing court, as was pointed out in the original discussion of this point, sustained the lower court in striking the answer of petitioner which set forth the various objections filed by the administratrix of the estate to the claim of respondent on the ground that the objections filed thereto were immaterial. Petitioner knows of no way by which it can be established that objections have been filed or defenses raised to a claim other than to show same by the pleadings filed. It certainly became material in this case for the respondent to establish that the release was the sole ground upon which her claim was denied in the Probate Court, if what happened in the Probate Court was at all material and could be construed as an element of damage. The pleadings of the representative of the estate, as has been shown, demanded strict proof of respondent of her claim against said estate.

Respondent cites *Andrews* v. *Votaw*, 240 Ill. App. 311 (page 23 of her brief), which clearly was intended to be applicable to Point III, for the purpose of contending that the court of review followed the Illinois law. An examination of that case, however, shows that the claim there was predicated on a negotiable note and that the representative of the estate, instead of disclaiming knowledge

and demanding strict proof, set forth an affirmative defense of payment; and, of course, in view of such a pleading, the court held that the burden of proof was upon the administrator of the estate to establish that affirmative defense. This position was very different from that taken by the administratrix of McConnell's estate.

Respondent also cites the case of *Ivanhoe* v. *Buda*, 247 Ill. App. 336, 341, as an authority in support of the action of the trial court and the reviewing court in holding that it was proper to strike that portion of petitioner's answer which set up the objections filed in the Probate Court to the allowance of respondent's claim therein. There is no question but what the ruling of the court in *Ivanhoe* v. *Buda* was correct. During the trial of that case there was an attempt to introduce certain documents issued by the Industrial Commission in connection with the hearing of the case before that Commission. The documents in question were not presented, however, for the purpose of showing that certain pleadings and issues had been raised before the Commission, but were attempted to be introduced for the purpose of establishing certain facts therein related. Clearly such documents were not the best evidence and were undoubtedly hearsay, and the decision in that case in no way supports the ruling of the trial court here in striking from this petitioner's answer the defenses raised in the Probate Court, as these defenses were included in petitioner's answer, not for the purpose of establishing that such were the facts, but for the purpose of establishing that certain defenses and objections had been raised, among others that strict proof was demanded of the plaintiff to establish her claim, and also for the purpose of laying the foundation for refuting the contention of respondent that her claim was disallowed and barred solely by reason of the interposition of the release.

The holding by the trial court and the reviewing court

that the objections filed to the claim of plaintiff by the administratrix of the estate were immaterial was contrary to the law of the State of Illinois to the effect that when objections are filed to a claim against an estate and strict proof demanded, that strict proof must be made by the claimant. And, therefore, as stated on page 59 of petitioner's brief in support of his petition, "the only deduction that one can make from the opinion of the reviewing court is that it determined, contrary to the statute of the State of Illinois governing the procedure for establishment of a claim in the Probate Court when same has been objected to, that it was not necessary to introduce evidence to prove the claim and that the filing of the claim in the Probate Court was of itself sufficient, even when the claim was objected to."

IV.

The opinion of the Circuit Court of Appeals for the Seventh Circuit decided an important question of local law in a manner probably in conflict with applicable local decisions in that it determined that when a case is predicated upon affirmative, fraudulent, deceitful representations it is not necessary that the same be proved by a clear preponderance of the evidence.

In reply to the above contention of the Petitioner set forth on page 60 of his brief, the Respondent on page 25 under IV quotes from the opinion of the reviewing court in this case 117 Fed. (2) 680. Petitioner had requested instructions as set forth on pages 61 and 62 of his brief herein, the same being Defendant's Requests VII (Tr. 347) and III (Tr. 344-345); these instructions the court refused to give and instead the court gave instructions, eliminating therefrom the part italicized in each instruc-

tion. Said instructions appear in the record (Instr. 21, Tr. 374) and (Instr. 12, Tr. 371). The instruction proposed and presented to the court before the final arguments by the Plaintiff and Defendant, appear on pages 338-349 of the record. Arguments were had on the instructions at that time, as appears on the top of page 350 of the record. It therefore clearly appears that the court was specifically requested to give the two instructions presented by the petitioner, and the court changed the instructions as indicated. How then can it be said by the Respondent that the trial court's attention was not properly and opportunely called to the fact that the instruction should be given as requested by the petitioner.

Respondent cites *The Merchants' National Bank* v. *Lyon,* 185 Ill. 343, 354. From an examination of this case it appears that the verdict of the jury was in favor of the defendant who was charged with fraud. The defendant did not ask for an instruction of the kind requested by this Defendant. It was clearly not necessary for him to do so, and no issue was made of the fact, and the court simply says on page 354:

> "Fraud being alleged, it must be established by a preponderance of the evidence."

The case of *Endsley* v. *Johns,* 120 Ill. 469, was a case predicated on fraud. The finding was in favor of the Plaintiff. There was no discussion whatever in the court's opinion as to the character of instruction that the defendant was entitled to in such a case in respect to whether or not the fraud or deceit must be proved by a clear preponderance of the evidence. The defendant did not raise that question or ask for such an instruction.

The case of *Miller* v. *Steele,* 153 Fed. 714, 721, was a case predicated on a contract for services rendered by one

member of a family to another member. On page 720, at 3 the court says:

> "* * * it is stated that the court was requested to give an instruction to the jury in relation to the character of the proof required to establish a liability for services rendered by one party to another while they are holding a family relation with each other."

The instruction requested was refused, and on page 721 the court discusses the fact that it was only necessary to prove the contract in question by a preponderance of the evidence. The case has no application to the case before the court, and secondly, it was not a case decided by an Illinois court or predicated on Illinois law.

The case of *Crane* v. *Schaefer,* 140 Ill. App. 647, was merely an Appellate Court case, and if it in any way supports the contention of Respondent, it is contrary to the holdings of the Supreme Court of the State of Illinois on the question of the proof required to establish fraud and deceit. However, an examination of that case shows the discussion was not predicated upon an instruction of the kind requested by the petitioner in this case, but was predicated on a request for an instruction by the Defendant that the fraud and deceit must be proved beyond a reasonable doubt.

The case of *Mortimer* v. *McMullen,* 202 Ill. 413, was one in which the plaintiff sought to foreclose a mortgage. The defendant pleaded the mortgage was obtained by fraud and deceit. The court on page 416 says:

> "If the evidence is admissible, as conducing in any degree to the proof of the fact, the only legal test, applicable to it upon such an issue (namely the issue of fraud) (our parenthesis) is its sufficiency to satisfy the mind and conscience, and produce a satisfactory conviction or belief. (*Carter* v. *Gunnels,* 67 Ill. 270) The proof, however, must be satisfactory. It must be so strong and cogent as to satisfy a man of sound

judgment of the truth of the allegation. (*Schroeder* v. *Walsh, supra*)

This case as a matter of fact definitely tends to support the position of the petitioner in respect to the instructions that the trial court should have given to the jury rather than the contention of the Respondent, and it is interesting to note that in that case as in the other cases, the court did not hold that in a case of the kind and character before this court, the defendant would not be entitled to an instruction of the kind requested by this defendant.

We again call attention to the case Petitioner cited in his original brief and to the fact that it is a much later case than any cited by the Respondent, and submit that the Petitioner has supported his contention that when a case is predicated upon affirmative, fraudulent, deceitful representations, it was necessary that the same be proved by a clear preponderance of the evidence, and that he was entitled to have the jury charged to that effect, and that the opinion of the Circuit Court of Appeals for the Seventh Circuit is contrary to the law of the State of Illinois in that respect.

CONCLUSION.

It is again respectfully submitted that this Honorable Court should grant the writ of certiorari prayed for in the petition for each and all the various reasons set forth in I to VII, inclusive, on page 13 of the petition for the writ, predicated on each and all the errors hereinbefore set forth in the argument, and further respectfully submits that the judgment of the Circuit Court of Appeals for the Seventh Circuit (Tr. 443) should be reversed, and that said cause should be certified to this the Supreme Court for determination by it with the same power and authority and like effect as if the cause had been brought there by unrestricted writ of error or appeal, irrespective of any matter or thing set forth in respondent's brief.

Respectfully submitted,

By CHARLES H. SOELKE,
Counsel for Petitioner.